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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1520

PHILLIP BURROUGHS, et al., *Petitioners,*

vs.

STERLING TRANSIT COMPANY, a California corporation, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR EMPLOYER-RESPONDENTS NOT INCLUDING T.I.M.E.-DC, INC. IN OPPOSITION

OPINIONS BELOW

The Order denying Petitioners' Motion to File Late Notice of Appeal of the U. S. District Court for the Central District of California is appended as Appendix A herein.

The written opinion of the United States Court of Appeals for the Ninth Circuit is reported at F.2d

..... (9th Cir. 1973, Case No. 72-2699) and is set forth as Petitioners' Appendix A.

QUESTIONS PRESENTED

I. In light of well-recognized and uniformly followed authority that the timely filing of a notice of appeal is jurisdictional, should this Court grant review?

II. Where the District Court's finding of an absence of excusable neglect is not clearly erroneous, should this Court grant review?

STATUTE INVOLVED

28 USC 2107 provides:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

"In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

"In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

"This section shall not apply to bankruptcy matters or other proceedings under Title 11. June 25, 1948, c. 646, 62 Stat. 963; May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104."

RULES INVOLVED

I. Rule 4(a) of the Federal Rules of Appellate Procedure. The revelant sections provide:

"In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from. . . .

* * *

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by

motion with such notice as the court shall deem appropriate."

II. Rule 26(b) of the Federal Rules of Appellate Procedure. The relevant paragraph provides:

"The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal."

III. Rule 52(a) of the Federal Rules of Civil Procedure. The relevant sentence reads:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

COUNTERSTATEMENT OF THE CASE

A. Counterstatement of facts.

This case involves a complaint for alleged wrongful discharge of certain participants in the illegal Teamsters strike which occurred in Los Angeles and in other areas of the United States during the Summer of 1970. The complaint was originally filed in the Superior Court of the State of California, for the County of Los Angeles, and was subsequently removed to the United States District Court for the Central District of California (CR 104).[1] The case

[1]The symbol "CR" refers to the Clerk's Transcript of the proceedings in the District Court.

was assigned to the Honorable A. Andrew Hauk and given Case No. 71-572-3-AAH. Thereafter, Respondent (hereinafter called "Respondent-Employers")[2] and other respondents filed Motions to Dismiss and for Summary Judgment. On May 17, 1971, a hearing was held on these Motions. There was no appearance by Petitioners' attorney although papers had been filed in opposition to the Motion to Dismiss (CR 104). After consideration of the pleadings as well as the Affidavits and Points and Authorities presented to the court, the Motions were granted. Findings of Fact and Conclusions of Law in Summary Judgment and Order for Dismissal submitted by Respondent T.I.M.E.-DC, Inc. were signed by the judge and filed. On June 7, 1971, Respondent's Notice of Entry of Judgment showing service on counsel for Petitioners was also filed with the court. On June 8, 1971, Findings of Fact and Conclusions of Law and the Order and Judgment of Dismissal on Summary Judgment dismissing the complaint with prejudice as to the Respondent-Employers and Findings of Fact and Conclusions of Law and the Judgment dismissing the complaint as to Respondent-Union were entered (CR

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[2]The term "Respondent-Employers" is used to provide a concise reference to the Respondents on whose behalf this brief is submitted. Respondent-Employers is not used here to refer to T.I.M.E.-DC, Inc., but includes only California Trucking Association, Alltrans Express California, California Motor Express, Dart Transportation Service, Delta Lines, Inc., Dependable Trucking Co., DiSalvo Trucking Company, Imperial Truck Lines, Inc., Kern Valley Trucking, Metropolitan Terminals, Shippers Express, Signal Trucking Service, Ltd., Smith Transportation Co., Star Truck & Warehouse Corporation, Sterling Transit Co., Inc., Victorville-Barstow Truck Line, and Willig Freight Lines.

105). At the same time the Clerk's Notice of Entry of Judgment, dated June 9, 1971, was sent to all parties (CR 27). On June 24, 1971, Respondent-Employers filed a Notice to Tax Costs incurred by them in defense of the action. Said Notice contained an affidavit showing service on Petitioners (CR 144-145).

It was not until June 9, 1972, that Petitioners, through their new counsel, took any action to appeal the final judgments which had been entered in May and June, 1971 (CR 105). This action consisted of Petitioners' Motion to File a Late Notice of Appeal. Thereafter, Respondents opposed this Motion on the grounds, *inter alia*, (1) that the filing of such notice was untimely in that it did not comply with Rule 4(a) of the Federal Rules of Appellate Procedure (hereinafter F.R.A.P.); (2) that the trial court was without jurisdiction at that time to extend the period for filing a notice of appeal; and (3) that even if the court had jurisdiction, there was no showing of "excusable neglect" sufficient to warrant an extension of time for the filing of a notice of appeal. After consideration of the arguments of counsel, the District Court denied Petitioners' Motion to File a Late Notice of Appeal on the above-stated grounds urged by Respondents.

B. The decision of the Court of Appeals.

The Petitioners sought to appeal the adverse ruling of the District Court, while alternatively making an original application for permission to file an untimely notice of appeal.

Stating that it, "together with other circuits", had held the requirements of Rule 4(a), F.R.A.P., to be jurisdictional, the Court of Appeals for the Ninth Circuit dismissed the appeal for lack of jurisdiction.

ARGUMENT

I

THE PETITION PRESENTS NO NEW OR UNIQUE QUESTION TO BE DECIDED BY THE COURT

A. The Petition fails to present any basis for review by this Court.

Rule 19 of the Rules of the Supreme Court of the United States establishes the principle that review by this Court is warranted only where there are special and important reasons therefor. Inasmuch as the Petition seeks to raise an issue which has long and uniformly been settled by the Appellate Courts (see Arguments B, C and D, *infra*), Petitioners must show special and important reasons for this Court to review the lower court's decision. Petitioners have simply failed to do so. Although Petitioners discuss the merits of their case, the Petition remains utterly silent as to the threshold question of reviewability. Accordingly, the Petition should be denied.

B. The lower courts were without jurisdiction to grant permission to file an untimely notice of appeal.

It is undisputed that more than a year passed after the entry of Judgment before Petitioners made any effort to file a notice of appeal. Although Petitioners admit that under such circumstances the filing of a Notice of Appeal would be outside the time limit prescribed by Rule 4(a), F.R.A.P.,[3] they nonetheless attempt to disregard the clear language of this rule in their Petition.

Respondent-Employers submit, as the District Court and the Court of Appeals found, that compliance with Rule 4(a), F.R.A.P., is a jurisdictional matter. This position has been well-recognized by the courts which have consistently held that the failure to appeal within the time limit prescribed constitutes a jurisdictional defect which neither the court nor the parties can remedy. *Alexander v. Sacha,* 439 F.2d 742 (9th Cir. 1971); *Diffenderfer v. Homer,* 408 F.2d 1344, 1346 (5th Cir. 1969); *Winchell v. Lortscher,* 377 F.2d 247, 251 (8th Cir. 1967); *Edwards v. Doctors Hospital, Inc.,* 242 F.2d 888 (2d Cir. 1957); *Weedon v. Gaden,* 419 F.2d 303 (D.C. Cir. 1969); *Lathrop v.*

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[3]Rule 4(a), F.R.A.P., provides in relevant part as follows:

"In a civil case . . . in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the entry of the judgment or order appealed from; . . .

* * *

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

Oklahoma City Housing Authority, 438 F.2d 914 (10th Cir. 1971). Cf., *Buckley v. United States*, 382 F.2d 611 (10th Cir. 1967). And the time for filing a Notice of Appeal may not be enlarged. Rule 26(b), F.R.A.P.;[4] *Alexander v. Sacha, supra; Edwards v. Doctors Hospital, Inc., supra.*

In *Lathrop v. Oklahoma City Housing Authority, supra*, the Court of Appeals for the Tenth Circuit held that appellant's failure to file a timely notice of appeal necessitated dismissal of the attempted appeal despite appellant's contention that they had not received notice of the District Court's denial of timely post-trial motions filed by appellant. The Court explained its dismissal of the appeal as follows:

> "A court of appeals acquires jurisdiction of an appeal from a district court decision only upon the filing of a timely notice of appeal. This requirement is mandatory and jurisdictional. . . . *In the instant case, we are concerned with 28 USC Sec. 2107 and Rule 4(a) Federal Rules of Appellate Procedure and are aware of no cases that hold other than that a timely notice of appeal is mandatory and jurisdictional.* [Citations omitted]." [Emphasis supplied.] 438 F.2d at 915.

Other recent decisions also establish that timely filing of a notice of appeal is both mandatory and jurisdictional. *Schaefer v. National Bank of Lincoln-*

[4]Rule 26(b), F.R.A.P., provides in relevant part as follows:
"The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, . . ."

wood, 465 F.2d 234, 236 (7th Cir. 1972); *Torockio v. Chamberlain Mfg. Co.,* 456 F.2d 1084, 1085 (3d Cir. 1972); *Gulf-Tampa Dry Dock Co. v. The Vessel "Virginia Trader",* 435 F.2d 150, 151 (5th Cir. 1970); *Fitzsimmons v. Yeager,* 391 F.2d 849 (3d Cir. 1968), *cert. den.,* 393 U.S. 868 (1968).

Under Rule 4(a), F.R.A.P., Petitioners were required to file their notice of appeal within thirty days after entry of judgment. Upon showing of "excusable neglect", the District Court could have extended the time for filing of a notice for an additional period not to exceed thirty days, thereby providing Petitioners with a maximum sixty-day period within which to perfect their appeal. Because no notice of appeal was filed within this period authorized by Rule 4(a), F.R.A.P., there is no jurisdictional basis for further proceedings herein.

To support their contention that Rule 4(a), F.R.A.P., does not establish jurisdictional requirements, Petitioners rely on *Taglianetti v. United States,* 394 U.S. 316 (1969), in which this Court held that the time limitation for filing writs of certiorari, as contained in Rule 22 of the United States Supreme Court Rules, is not jurisdictional. The Petitioners' theory seems to be that this Court should apply the same relaxed interpretation to Rule 4(a), F.R.A.P., since it, like Rule 22, establishes a time limitation. Petitioners, however, have failed to recognize basic differences between the two rules.

In *Taglianetti, supra,* this Court merely recognized its inherent ability to interpret rules which it had itself imposed for the conduct of business. Since this

Court had promulgated Rule 22, it was free to interpret it as being nonjurisdictional. Rule 4(a), F.R.A.P., on the other hand, is more than an order of this Court. Rule 4(a) serves to incorporate into the Federal Rules of Appellate Procedure the time limitations for taking appeals previously established by 28 USC 2107,[5] and thus has the force and effect of a Congressional enactment. Accordingly, it is not subject to discretionary relaxation by the judiciary. This Court has indicated its recognition of the above distinction. See *Schacht v. United States,* 398 U.S. 58, 64 (1970).

Additionally, Rule 22 stands alone in that it is not modified by any other Rule. But Rule 4(a), F.R.A.P., is given greater impetus and strength by Rule 26(b), F.R.A.P., which states that "the Court may not enlarge the time for filing a notice of appeal." Additionally, when Rule 4(a) is read in conjunction with Note No. 3 of the Advisory Committee to the Federal Rules of Appellate Procedure, the intent of the Framers of the Rule as to jurisdiction becomes absolutely clear. This Note states:

> "Rules 3 and 4 combine to require that a notice of appeal be filed with the clerk of the district

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[5]28 USC provides in relevant part as follows:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree."

> court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional', *United States v. Robinson,* 361 U.S. 220, 224, 80 S.Ct. 282, 4 L. Ed. 2d 259 (1960), compliance with the provisions of those rules is of the utmost importance."

Petitioners *have not cited one case* dealing with an interpretation of Rule 4(a), F.R.A.P., which indicates in any respect that compliance with its provisions is not jurisdictional or that a court can extend the time period for filing a notice of appeal for more than an additional thirty days. Respondent-Employers submit that the reason for the absence of any citation is because the law is so clearly established that *the timely filing of a notice of appeal is both a mandatory and jurisdictional prerequisite to any appeal herein.*

C. The District Court did not abuse its discretion in finding an absence of "excusable neglect".

Even assuming *arguendo* that jurisdiction existed, the Petition must nonetheless be denied since the Appellate Courts must accept the finding of the District Court that there was no "excusable neglect" unless such finding of fact is "clearly erroneous". Rule 52(a) of the Federal Rules of Civil Procedure; *Uhlhorn v. U. S. Gypsum Co.,* 366 F.2d 211, 218 (8th Cir. 1966), *cert. den.,* 385 U.S. 1026 (1967). Even if the record were susceptible of diverse inferences, the District Court's finding is conclusive on review unless it is "clearly erroneous". *Hoppe v. Rittenhouse,* 279 F.2d 3, 9 (9th Cir. 1960).

Petitioners contend that their prior attorney, Mr. Raatz, acted negligently by not filing a notice of ap-

peal. Even assuming that Mr. Raatz was negligent, it is well established that such negligence is not "excusable neglect" within the meaning of Rule 4(a), F.R.A.P., which would warrant an extension of time within which to file a notice of appeal. *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962); *Harlan v. Graybar*, 442 F.2d 425 (9th Cir. 1971); *Russo v. Flota*, 303 F.Supp. 1404 (S.D. N.Y. 1969); *Frank v. Amsterdam Cas. Co.*, 27 F.R.D. 258 (E.D. Pa. 1961).

In the *Frank* case, the defendant asked its attorney to file a notice of appeal. However, the lawyer left town without telling the defendant and never did file the appeal. Eventually, the defendant hired a new attorney who learned that the appeal was never taken. By the time the new attorney found out that the notice of appeal had not been filed, the time period for filing had run. Nonetheless, the defendant sought an extension of time for appeal. The court noted the existence of a strong policy favoring finality of litigation and held that no extension of the time for appeal was warranted. The court held that the defendant was bound by the action of its attorney even though the attorney had been acting contrary to the orders of the defendant.

In an analogous case involving attorney misconduct, this Court articulated the following in *Link v. Wabash R.R. Co., supra*, at 633-634:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the

> acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"

Petitioners were free to select any attorney they desired. They chose Mr. Raatz and quickly became aware of his inaccessibility. If they were dissatisfied with Mr. Raatz' legal work, they should have immediately discharged him and engaged a new attorney. Instead, Petitioners waited well over a year to engage new counsel. They should not now be allowed to avoid the consequences of Mr. Raatz' omission in filing a notice of appeal.

Petitioners detailed in several affidavits their experiences covering approximately a year during which they allegedly attempted to contact their prior attorney, Mr. Raatz. Also, various Petitioners indicated that they had made an effort to determine whether or not an appeal was made and that during this period of time they were unable to find any evidence that an appeal was made (CR 22-23, 35). Significantly, some of the affidavits indicating that Petitioners could find no evidence of an appeal were dated more than thirty days prior to the filing in the District Court of the Motion to Permit Filing of a Late Notice of Appeal (CR 28, 35, 43). Thus, even after Petitioners had discovered their plight and hired new counsel, they still failed to expeditiously prosecute their claims. Based on these affidavits as well as the entire record,

the District Court specifically found that there was no "excusable neglect" which would warrant the Court's granting an extension of time within which to file a notice of appeal (CR 78). Under such circumstances, the District Court's finding of the absence of "excusable neglect" cannot be said to be clearly erroneous and should not be subject to further review.

D. Petitioners were not deprived of due process of law.

In an attempt to evade the well-established line of authority that attorney negligence does not constitute "excusable neglect" (as discussed *supra*), Petitioners argue that the Fifth Amendment to the Constitution requires that the civil litigant receive effective assistance of counsel, that their former attorney did not sustain this duty of representation, and that they have therefore been denied their right to due process of law. Such argument is totally without merit.

It is fundamental that the Bill of Rights to the Constitution protects various basic rights of an individual from encroachment through the arbitrary exercise of *governmental* power. Accordingly, while the Fifth Amendment is designed to prevent the deprivation of an individual's life, liberty or property by arbitrary *governmental* action, it does not serve to protect the citizen from *individual*, non-governmental activity. *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926).

All of the cases relied upon by Petitioners stand for the proposition that due process requires that a

defendant in a criminal prosecution be represented by effective counsel. These cases thus recognize and support the fundamental purpose of the Fifth Amendment in protecting the individual from *governmental* prosecution without due process of law. They do not, however, support Petitioners' contention that "the civil litigant is entitled to the effective assistance of counsel the same as the criminal defendant."

Furthermore, *it is significant that Petitioners have not cited one case in support of their theory.* Respondent-Employers submit that Petitioners' failure to provide case authority is indicative of the fact that due process of law is not a viable issue.

II

THE PETITION DOES NOT PRESENT A CASE WHERE THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH ANOTHER COURT OF APPEALS

The instant Petition not only fails to raise any important question of federal law requiring decision by this Court, but presents a Court of Appeals decision which is in complete harmony with the decisions of other circuits. Significantly, the Petitioners have cited no authority contrary to the decision rendered by the Court below. The reason is simply that the other courts have uniformly held that compliance with Rule 4(a), F.R.A.P., is an essential jurisdictional prerequisite to an appeal. See cases in Argument I, *supra*.

CONCLUSION

As the foregoing analysis demonstrates, there is no basis for review by this Court. It is well established that Rule 4(a), F.R.A.P., is both mandatory and jurisdictional. However, even if there were no question of jurisdiction, there is insufficient evidence to set aside the District Court's finding of an absence of "excusable neglect". Furthermore, the alleged negligence of Petitioners' prior attorney does not constitute a denial of due process of law. Respondent-Employers respectfully submit, therefore, that the Petition for a Writ of Certiorari should be denied.

Dated, June 8, 1973.

Respectfully submitted,

GEORGE J. TICHY, II,

LITTLER, MENDE'SON & FASTIFF,

Counsel for Employer-Respondents California Trucking Association, Alltrans Express California, California Motor Express, Dart Transportation Service, Delta Lines, Inc., Dependable Trucking Co., DiSalvo Trucking Company, Imperial Truck Lines, Inc., Kern Valley Trucking, Metropolitan Terminals, Shippers Express, Signal Trucking Service, Ltd., Smith Transportation Co., Star Truck & Warehouse Corporation, Sterling Transit Co., Inc., Victorville-Barstow Truck Line, and Willig Freight Lines.

(Appendix A Follows)

Appendix A

United States District Court
for the Central District of California

Civil No. 71-572-3-AAH
(Consolidated)

Phillip Burroughs, et al.,
Plaintiffs,
vs.
Sterling Transit Company, et al.,
Defendants.

[Filed Aug. 18, 1972]

ORDER DENYING PLAINTIFFS' MOTION TO PERMIT PLAINTIFFS TO FILE LATE NOTICE OF APPEAL

Plaintiffs' Motion for an Order Permitting Plaintiffs to File Late Notice of Appeal from Judgment of Dismissal having come on regularly before this Court on July 31, 1972, Plaintiffs having been rep-

resented by Don Edgar Burris, Esq., Defendant T.I.M.E.-DC, Inc., having been represented by Harry J. Keaton, Esq., of Rutan & Tucker, the other Employer-Defendants having been represented by George J. Tichy, II, Esq., of Littler, Mendelson & Fastiff, and the Union-Defendants having been represented by Richard J. Davis, Jr., Esq., of Brundage, Neyhart, Miller, Ross & Reich, and the Court having considered the record heretofore had herein, including the Order and Judgment in favor of T.I.M.E.-DC, Inc., filed May 18, 1971, the Order and Judgment in favor of the other Employer-Defendants, filed June 8, 1971, and the Judgment in favor of the Union-Defendants, filed June 8, 1971, the motion papers of Plaintiffs, as well as the points and authorities and other matters submitted by the parties herein, and having determined:

1. That the filing herein of any notice of appeal by Plaintiffs would be untimely;

2. That the Court is presently without jurisdiction to extend the time period for filing a notice of appeal; and

3. That even if the Court presently had jurisdiction to extend the time period for filing a notice of appeal, there has been no "excusable neglect" within the meaning of Rule 4(a), Federal Rules of Civil Procedure, which would warrant the granting of said extension;

It Is Hereby Ordered that Plaintiffs' Motion for An Order Permitting Plaintiffs to File Late Notice of Appeal be, and it hereby is, denied.

Dated: August 17, 1972.

Charles H. Carr
United States District Judge

Approved as to form:
Littler, Mendelson & Fastiff
By: /s/ George J. Tichy, II
George J. Tichy, II
Attorneys for Employer-Defendants other than T.I.M.E.-DC, Inc.

Rutan & Tucker
By: /s/ Harry J. Keaton & J. N. Counter, III
Harry J. Keaton
Attorneys for Defendant T.I.M.E.-DC, Inc.

Brundage, Neyhart, Miller, Ross & Miller
By: /s/ Richard J. Davis, Jr.
Richard J. Davis, Jr.
Attorneys for Union-Defendants

/s/ Don Edgar Burris
Don Edgar Burris
Attorney for Plaintiffs